76-1103

OCTOBER TERM, 1976

RAY J. BERAN and ANDREW KAMINSKI,

Petitioners

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAMES W. HEYER
6825 East Iliff Av. #304
Denver, Colorado 80224
Attorney for Petitioner

INDEX

AUTHORITIES CITED

INDEX-page 4 Page

Rules

NO. __________

IN THE
SUPREME COURT OF THE UNITED STATES
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Petitioners, Ray J. Beran and Andrew Kaminski, pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause on December 16, 1976, wherein the United States of America was plaintiff-appellee and the petitioners were defendant-appellants.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals, Eighth Circuit, against which this petition is pursued, has not yet been published. It is reproduced in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals, Eighth Circuit, was entered on December 16, 1976. Petition for rehearing was denied on January 10, 1977.

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

A. Under its own test of the evidence, was not the trial court obligated to grant judgment of acquittal?

B. Where decision on a motion for judgment of acquittal has been reserved under Fed. R. Crim. P. 29(b) and remains under consideration past the 7-day period allowed for filing a motion for new trial under Fed. R. Crim. P. 33, has not the trial judge retained jurisdiction to grant a new trial if requested before his determination of the Rule 29 motion?

C. Should not the appellate court have ordered a new trial for substantial error where, in a misapplication of bank funds case, jury instructions were refused on such key matters in evidence as:

1. Valid consent of the board of directors;
2. Mere maladministration or poor judgment;
3. Good faith; and
4. No probability of loss to the bank?

D. Is there not manifest necessity for a new trial in this case because of the prejudicial effect of evidence presented on Count 1?

STATUTE INVOLVED

Title 18 United States Code Sec.656, in pertinent part, provides:

> Theft, embezzlement, or misapplication by bank officer or employee
>
> "Whoever, being an officer,director, agent of employee of, or connected in any capacity with any * * * bank * * * embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined, or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

RULES INVOLVED

Rule 29(b) of the Federal Rules of Criminal Procedure provides:

Reservation of Decision on Motion

"If a motion for judgment of acquittal is made at the close of all the evidence the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict."

Rule 33 of the Federal Rules of Criminal Procedure provides:

New Trial

"The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period."

STATEMENT OF THE CASE

This is a criminal case. Jurisdiction below was involved pursuant to 18 U.S.C. §656.

The indictment was in twelve counts. No conspiracy was alleged. Each of the counts charged separate acts of misapplication of funds by one, or the other, or both of the petitioners while they were either officers, directors or stockholders of the First National Bank of Belfield, Belfield, North Dakota during the period from August, 1973 through May, 1974.

Count 1 was the heart and soul of the government's case. It charged that during September and October, 1973 both petitioners knowingly and wilfully misapplied and converted to their own use $482,000 in funds of the Bank by selling an unauthorized, over-issue of bank stock.

This was a "shotgun" type of indictment. In the course of his investigation which led to the indictment on Count 1, national bank examiner Nelson "listed" other bank loans and expenditures involving the petitioners which, although not prohibited by banking regulations, in his sole discretion he deemed to be "unsound" banking practices" or "self-dealing." Each of these transactions became the subject of one of the remaining counts in the indictment.

The government's case-in-chief took twelve days to try and 53 witnesses were presented by the prosecution. The first eight trial days were consumed by the

testimony of 46 Count 1 witnesses. Ten of those witnesses dealt with the purchase by petitioners of controlling interest in the outstanding capital stock of the Bank and the manner in which their acquisition was financed. The other 36 Count 1 witnesses were all residents of the Belfield, North Dakota community to whom petitioners had sold stock the proceeds of which, the government claimed, should have gone to the Bank.

The undisputed evidence was that, at the time alleged, the petitioners owned controlling interest in the Bank, and all 500 shares of its authorized capital stock were then issued and outstanding. It was also established that during the period in question the petitioners actually sold 274 bank shares (at $1,800 each) for which they received, but did not pay to the bank, the proceeds of $493,000.00.

The government's theory was that fresh capital stock in the Bank, had been sold, "over-issued" without authority from the Comptroller of the Currency, the proceeds of sale from which belonged to the Bank. The certificates issued to buyers in these transactions did represent shares of capital stock in the Belfield Bank; but petitioners contended, and the evidence conclusively established that the shares sold belonged to the petitioners--not the Bank. Certificates for all stock sold were transferred from shares previously authorized, paid-up and properly issued. This was not a new issue of capital stock in the Bank, and

no funds or assets of the Bank were involved.

Less than three days were required to present the remaining seven witnesses in an effort to prove the other eleven counts. Counts 2 through 6 involved lawful loans to the petitioners or for their benefit made with prior approval of the Bank's board of directors. Counts 7 through 12 dealt with money paid by the Bank to the petitioners or others for expenses which, allegedly, were not properly chargeable to the Bank. All of those disbursements were also made with prior board approval.

At the close of the government's case, the court granted the defense Rule 29 motion for judgment of acquittal on Count 1 because of a failure to prove that monies of, or entrusted to, the bank were involved. After the defense motion for a judgment of acquittal as to the remaining counts was denied, the case was submitted to the jury which found Beran guilty on Counts 7, 9, 10 and 12, and Kaminski guilty on Counts 6, 8, 9, 10 and 11.

A. Facts material to a consideration of whether judgment of acquittal should have been granted on counts 6 through 12.

Count 6. On March 29, 1974 the Bank made a $47,500 loan to Continental Colorado Corporation ("CCC", a firm of which Kaminski was president), owner of a 50%

general partnership interest in a venture involving five sections of coal lands at Amidon, North Dakota, approximately 30 miles from the Bank at Belfield. The loan was for one year, due March 29, 1975 and was evidenced by a promissory note signed by Mr. Kaminski in his capacity as president. In support of the loan, the Bank then had on file current financial statements (unaudited) of Mr. Kaminski showing a net worth of about $1, 190,000, and of CCC showing net worth of about $355,000. This loan had specifically been approved and authorized by the Bank's board of directors the previous day, as reflected in the minutes of that meeting.

On the dates of approval and disbursement of this loan, Mr. Kaminski was neither an officer nor a director of the Bank. He was a shareholder, then owning 17% of the issued and outstanding capital stock of the Bank. The indictment, in count 6, charges that Kaminski, as a stockholder of the bank, on March 29, 1974, with intent to injure and defraud the Bank, did wilfully misapply the $47, 500 by fraudulently causing the loan to be made to CCC.

The evidence showed that the Bank's officers and directors were permitted to make loans, in their discretion, to anyone they deemed to be financially responsible, within the lending limits of the Bank. At the time of this loan, the limit on loans to any single borrower, as determined by the capital accounts of the Bank, was $50,000. According to the Bank

president, the financial statement of CCC was substantial enough to justify this loan and it was within the lending limit of the Bank. No law or banking rule or regulation, nor any interpretation of the Comptroller of the Currency prohibited or made illegal this loan, and it was made upon express prior approval of the Bank's officers and directors.

On May 4, 1974 bank examiner Nelson arrived at the Bank to conduct a "regular" examination, in the course of which he reviewed this loan file along with several hundred others. Nelson concluded that this was a "substandard" loan, "unsound" because he did not feel the unaudited financial statement of CCC supported an unsecured loan of that size. In all of the other loan files he examined, Nelson did not recall seeing any "audited" financial statements and those of Kaminski and CCC were never shown by the evidence to be false or inaccurate in any way. Government counsel simply argued that they were inflated.

Nelson also criticized this loan as being "self-dealing," which he characterized as being where an officer or shareholder borrows from his own bank. "He is dealing with himself." Nelson conceded that there was nothing unlawful about a loan made to a corporation in which a bank officer, director, or shareholder has an interest. Such loans are not automatically bad, nor are they necessarily even subject to criticism. "We just look at them closely."

Having drawn his conclusions, Nelson then in the exercise of his discretion, elected to request the Bank president to "remove" the loan, meaning that the borrower is asked to pay-off the loan or refinance it at another lending institution. Nelson said that he had no authority to "call" a loan due. "We (examiners) rely on requests and suggestions to resolve any 'unsound banking practices'...which do not necessarily involve any violation of a criminal statute."

Nelson elected to seek removal of the $47,000 loan only five weeks after it was made. By its terms, it was not due until the month preceding the indictment. Nelson gave the Bank president no valid reason for requesting that this loan be removed, nor did he contend it was illegal or improper. "When a bank examiner makes a recommendation or direction to an officer, he has to obey--whether or not he has a valid reason". If a loan is not removed as requested the examiner can direct the Bank to charge it off, and that is what happened in this case. Mr. Kaminski was unable to refinance it or pay off the loan prematurely, and the Bank was then directed to charge it off as of December 31, 1974.

In June, 1975, Kaminski caused CCC to assign to the Bank all of CCC's partnership interest in the Amidon lands to insure repayment of the $47,500 loan. The evidence was that some portion of the lands had been sold and that, when the proceeds are disbursed, CCC will realize $72,000. That had not happened by the

time of trial and, in the meantime, the Bank sued on the note. In August, 1975 Kaminski allowed an uncontested, default judgment to be taken by the Bank against CCC and himself, in the full amount of the note plus accrued interest.

Mr. Kaminski testified that he never intended to injure or defraud the bank. There was no evidence to the contrary. He testified that the loan was made with intention to repay it, and no reason was shown why that expectation was unreasonable.

<u>Count 7</u>. In addition to loan files, Nelson's examination included a review of other Bank expenditures made to or for the benefit of the defendants to see if any met his "self-dealing" critera. The Bank records disclosed that during the period from December, 1973 to July, 1974 the Bank had received monthly statements from Stanley Gibler, billing the Bank for its portion (one-third) of the expense of a feed lot study he was conducting. In payment of those statements the Bank had issued a series of checks totaling $3,866.99. It was Nelson;s belief that this was not a proper Bank expenditure since no benefit inured to the Bank; accordingly, these payments became the subject of Count 7 of the indictment which charged that during such period Mr. Beran, with intent to injure and defraud the Bank, did wilfully misapply and convert to his own use $3,866.99 in Bank funds by causing that sum to be paid to Gibler.

Testimony established that the idea for

a feed lot study originated with Beran. He had been involved in analysis of cattle-feeding operations in association with a professor of the Agricultural College at the University of Nebraska. In their opinion, Midwestern farmers and ranchers were losing a large amount of potential income because they were not "finishing-out" the products they raised. His study of North Dakota revealed that only seven percent of the cattle and feed grown and raised there were retained, while meat for consumption was being imported from other places. He felt that improved efficiency in finishing cattle would be of great help to ranchers and feeders in the areas of the banks (three) he was part owner of, and that participation by those banks in conducting a feed survey would benefit the communities they served. Beran felt that anything of economic benefit to its customers would be of benefit to the Bank, particularly if it was the sponsor; and the banks, as lenders, would further benefit by gaining additional knowledge of this business. Beran therefore proposed to the boards of directors of all three banks he was involved in that they sponsor such a survey and share equally in the cost.

Beran explained his proposal to the board (he was then a director) of the Bank at Belfield, in great detail, on November 15, 1973. He also went through the program very thoroughly with the Bank's attorney for about two hours prior to the board meeting. After lengthy discussion, the Bank's directors all approved of the

plan and of the Bank's participation in it, and they authorized disbursement of such funds as were required to pay one-third of the cost.

Mr. Gibler, who formerly had been manager of a car-wash business in which Beran had an interest in Grand Island, Nebraska, was asked by Beran to conduct this feasibility study. Gibler had no previous experience in conducting cattle-feeding surveys, but he had a farming background. He understood he would be paid a consultant fee to be shared by each of the three banks involved.

Gibler did conduct the feed lot feasibility study and monthly billed each bank for one-third of his consultant fee, travel, office, and other expenses incurred. At his own suggestion, which was agreed to by Beran, he rented, for $300 per month an office in the building at Grand Island which house the car-wash. Rentals were paid to the owner of the car-wash business. Mr. Beran was one-third owner of a corporation that owned 15,000 shares in the car wash corporation, of a total of 52,000 shares, so he indirectly owned about 9 percent of that business.

Gibler traveled extensively attending seminars and visiting cattle-feeding operations in Texas, Iowa, Colorado, and Nebraska. He made two trips to North Dakota. He found that although North Dakota and Nebraska had plenty of grain and feeder calves, cold weather forced the feeder business into the southern states. Gibler concluded based on his visits, studies and comparisons, that confinement feeding,

in a particular type of unit(the "Morton Building") designed and then being efficiently operated by Iowa Beef Packers at Denison, Iowa, appeared to offer the best solution. He so reported and recommended, both in person and by memorandum, to the board members of all three banks. In addition, at the end of the study, he spoke at a town-hall meeting in Belfield attended by about 30 local farmers and ranchers, at which he reported his findings and conclusions. No obvious benefit to the Bank, such as loans made to ranchers to finance the building of confinement units, thereafter occurred because local interest waned due to soaring construction costs and plummeting cattle prices.

Nelson's criticism was that the money was wasted because Gibler was unqualified and the amount paid for office rental was excessive. The government's contention was that Beran was guilty of conversion since he was part owner of the car wash, and the consultant fees paid helped maintain Gibler, one of his former employees. In an effort to prove the banks were overcharged on rental, the government offered the testimony of a young salesman of a real estate company in Grand Island, Nebraska. Over objection, he was allowed to state that space of the same dimensions was available for $50.00 to $75.00 a month at a savings and loan office building in Grand Island. He had only been a salesman for about one year, had never seen the office rented by Gibler, was not familiar with what was included with rent-

al in the office building he used as a comparison, had not considered such factors as location, parking, traffic, accessibility to freeways, convenience or length of the lease, and he had never testified before. Moreover, his testimony was entirely hearsay. It was established that Gibler's rental included furniture, telephone, business machines, filing cabinets and all utilities.

Beran never personally received a dime of the funds paid to Gibler by the Bank. In fact, Gibler's absence as manager of the car wash cost Beran his investment in that company. Beran hired Gibler rather than a university expert because several university-sponsored feed lot studies had resulted in operations which went bankrupt, and he wanted a fresh, practical approach. Beran said his intent in this transaction was to improve the economy of the community and to benefit the Bank, not to injure or defraud it.

Beran's 17% share of undivided profits in the Bank during the period of these disbursements was approximately $13,000. There was no evidence that this expense was prohibited by or in violation of any law, banking rule, regulation, or interpretation of the Comptroller. The transaction was carried out without any concealment or falsity and with the express, prior, and knowledgeable approval of the Bank's board of directors.

Count 8. Nelson found that the Bank had purchased on September 20, 1973 a 1974 Cadillac coupe automobile for $8,410 which

was in use by Mr. Kaminski. The car was owned by and titled to the Bank, and was carried as an asset on the books of the Bank. However, since it was not primarily kept on Bank premises but most of the time was in Kaminski's possession at his Denver, Colorado residence, Nelson criticized this purchase as a non-Bank expenditure and instructed the Bank's president to remove it from the books. That was done, and Mr. Kaminski paid the Bank its purchase price and took title to the car.

The board of directors had expressly approved the purchase of this automobile on September 20, 1973. In spite of board approval and the fact that it was carried as a fixed asset of the Bank, Nelson "felt that the expense should be paid back since the car was not benefiting the Bank directly." Nelson said it was not unusual for a bank to own a car, but it was customary to keep it at the bank. No one claimed, nor was it shown, that this purchase was unlawful or in violation of any banking rule, regulation or interpretation of the Comptroller of the Currency. In the exercise of his discretion, Nelson simply "recommended that the board request this expenditure be restored to the Bank's books."

Kaminski denied any intent to defraud or injure the Bank in connection with the purchase or use of this car. He used it to visit ranchers in the Belfield area, encouraging them to make deposits and do business with the Bank. He called on numerous people for four months after the

purchase of the automobile, and during that period deposits of the Bank increased by $600,000. Deposits in the preceding eight months had only increased by $200,000, and deposits for the entire two-year period following the divestiture required by Nelson increased by only $600,000. 1973 was the best year ever for the bank. This transaction was the subject of Count 8 of the indictment, accusing Kaminski of misapplication of $8,954.00.

Count 9. To help resolve disputes which arose in their acquisition and financing the Belfield Bank stock, petitioners employed an attorney who billed them $1,000 for his assistance in those matters. Since his services helped resolve the ownership question and put an end to unrest among Bank employees (who were uncertain of their tenure because of an ongoing control dispute) petitioners felt his bill was properly a bank expense. The Bank paid this portion of the lawyers fee and did so with express prior approval of the board of directors. Count 9 of the indictment charged both petitioners with misapplication of $1,000 in Bank funds as a result of that payment.

Although this disbursement was, concededly, not prohibited by or in violation of any law, banking rule, regulation or interpretive ruling of the Comptroller, examiner Nelson criticized it since work was not done directly for the Bank. "It was more of a personal nature rather than bank business," and he requested that it be restored to the Bank. Petitioners

complied with the request and reimbursed $1,000 to the Bank.

On the date of this alleged misapplication, both defendants were directors, and Beran was president of the Bank. Their combined ownership in the Bank was 34%, and the amount of current earnings and undivided profits of the Bank to which that interest was then entitled equaled $19,000.

Count 10. Count 10 of the indictment charged both petitioners with wilfully misapplying $12,000 of Bank funds by fraudulently, with intent to injure the Bank, causing those funds of the First Insurance Agency of Belfield to be paid to themselves on August 24, 1973.

The evidence showed that this insurance agency was owned by the Bank. The agency's income was generated by earned premiums and commissions. Every 6 months its profits would be put into earnings of the Bank. Petitioners purchased this agency on the date its funds were allegedly misapplied. The previous day, they had acquired controlling interest in the Bank and both had become directors.

Sale of the agency to them on August 24th was discussed with and approved that day by the Bank's board of directors, however no price was then set nor were any sale documents executed. At a subsequent board meeting on October 18, 1973, a purchase price of $9,000, the highest of two appraisals. was agreed upon. On December

21, 1973 a Bill of Sale was delivered by the Bank to Belfield, Inc., a corporation petitioners had formed on September 9, 1973 for the purpose of separate ownership of the agency, and on December 26, 1973, they paid the purchase price of $9,000 to the Bank.

At petitioners request, the following transfer of funds was made: On August 23rd, $10,655.75 was withdrawn from the Bank's earnings account and was deposited into the checking account of the First Insurance Agency which had an existing balance of approximately $2,000. Of that $10,655.75, $7,655.75 represented premiums due to the Bank from earnings of the agency. A check was drawn August 24th on the First Insurance Agency account, payable to Beran-Kaminski and Associates, in the amount of $12,000.

Nelson was critical of this transaction because at the time of this transfer no sales price had yet been established nor had the sale formally been consummated. On March 5, 1974 he requested that $7,655.75 (the amount due the Bank from earnings of the agency) be restored to the Bank. In compliance with that request, the petitioners three days later on March 8th, reimbursed $7,655.75 to the Bank.

Petitioners claimed the withdrawal of $12,000 was not to defraud or injure the Bank, but was to partly defray the $30,000 expense of organizing Belfield, Inc. and qualifying it as a holding company.

Formation of a holding company, which defendants believed would be of benefit to the Bank and its shareholders is both time-consuming and expensive, requiring Federal Reserve Board approval. Success meant that Belfield, Inc. would own controlling stock interest in the Bank as well as the agency.

The sale of the agency meant the $9,000, concededly a fair price, was profit to the Bank. There was no false entry or concealment of any kind in connection with the agency sale or transfer of Bank earnings attributable to is profits. On the date of this alleged misapplication, the petitioners owned 66% of the Bank, and that percentage of the Bank's then current earnings and undivided profits entitled them to $18,000. Nelson admitted that that this disbursement was not made in violation of any law, banking rule or regulation or directive of the Comptroller known to him.

Counts 11 and 12 charged that Kaminski and Beran caused the Bank to reimbursement them for expenses which they claimed were incurred on behalf of the Bank but which, the government alleged, were purely personal.

These expenses were reviewed and approved by the Bank's board of directors as they were incurred, and the board further gave express approval on December 20, 1973 when they were paid. On that date Kaminski received an expense reimbursement check from the Bank for $2,674 and Beran

received one for $1,224. The funds for which petitioners sought reimbursement had been paid out by them during the preceding five months and, they contended, were incurred in connection with Bank business. Beran lived in Grand Island, Nebraska, and Kaminski lived in Denver, Colorado. Included in their expense lists were such items as mileage, food, and lodging to attend board meetings and other trips to Belfield on Bank business.

Nelson questioned these expenses, especially one or two items incurred prior to time petitioners became directors. Nelson agreed that payment of these expenses was not in violation of or prohibited by any law, bank regulation or ruling of the Comptroller, but he said it was an "unusual practice" for a Bank to pay expenses in connection with negotiations for control of the bank. Directors are usually paid expenses, he said, but the customary practice is to pay all directors equally regardless of personal circumstances, such as the distance one must travel.

Feeling that these should more properly be treated as personal rather than Bank expenses, Nelson recommended that the funds be restored to the Bank, and the defendants promptly did so in full. On the date the Bank disbursed these two expense checks to petitioners, their combined share of then current earnings and individual profits of the Bank amounted to $19,000.

* * *

It was never alleged nor shown that the Bank failed or that the petitioners did anything to impair its capital structure. No depositor suffered a loss and none of the acts alleged to be improper placed the deposits or assets of the Bank in jeopardy. The evidence established that every year since the petitioners acquired control, the deposits and earnings of the Bank had increased. It was, and still is in "excellent shape."

After the government rested, the defense moved for judgment of acquittal on all counts. The reasons urged for acquittal on counts 7 through 12 were:

a) the government had failed to prove, in every instance, a misapplication of funds, i.e., an "unlawful taking or conversion." All loans and disbursements in question were made lawfully to financially responsible people, without concealment or false entries, and were not made in violation of any banking regulation. There was no unlawful taking originally and could be no misapplication since upon authority and with valid consent of the board of directors, no conversion took place. Accordingly, the crucial element of a "misapplication" was absent;

b) there was no proof whatsoever of a specific, wilfull intent to defraud the Bank. To the contrary, evidence that all of the criticized expenditures were repaid (recognizing that re-payment itself is not a defense once misapplication has taken place) negates evil intent; and

c) there was no loss to the Bank (recognizing that none need occur if a misapplication is likely to cause one) because the Bank's capital was never in jeopardy and, as owners of controlling interest in the Bank, the petitioners were at all times entitled to, as their share of undivided profits and current earnings of the Bank, more money than was allegedly misapplied.

In denying acquittal on all but Count 1 of the indictment, the trial Court said:

> "The granting of such a motion at the close of the government's case is generally not desirable, because an appellate Court is denied reference to a verdict which in many cases allows a final disposition of the case on appeal.........
>
> "The standard to test a Rule 29 motion is:...'the trial judge must determine whether upon the evidence ... a reasonable mind might fairly conclude guilt beyond a reasonable doubt.' (emphasis supplied)."

The judge found there was "some evidence" to support each of the essential elements of those counts. Then he said (apparently being concerned only about the prejudicial effect of Count 1 evidence on the remaining counts, rather than whether the proof as to them met the test):

> "...Without passing on whether there is enough evidence to meet the standard set out above, I find that the

> extreme risk of prejudice does not exist among these counts, since each transaction is separate and distinct. Therefore, I find that as to counts two through twelve, to grant a motion for judgment of acquittal at this time would be premature." (Emphasis supplied).

At the close of all evidence, petitioners again moved for judgment of acquittal on all counts for the reasons previously urged in light of the case presented by petitioners who testified.

Both are honorably discharged veterans of the United States Air Force. Neither has ever before been arrested, convicted or even accused of any crime in any degree. Mr. Beran, age 53, is married, has six children, lives in Grand Island, Nebraska, and his background is in business and banking. Mr. Kaminski, age 42, is married with six children, lives in Denver, Colorado, and his business background is in sales, real estate and insurance.

Each defendant produced five character witnesses from throughout the country, all of whom were unimpeached and testified that both defendants enjoyed excellent reputations, not only where they live but in the Belfield, North Dakota community and in business and banking circles elsewhere, for honesty and fair dealing, truth and veracity, and for being law-abiding citizens.

Among Mr. Beran's character witnesses

were a CPA, a Priest, a policeman, a shareholder and customer of a Nebraska bank which Mr. Beran was president of, and the former Governor of South Dakota who owned 15 Midwest banks and was well acquainted with Mr. Beran's reputation in banking transactions.

Among Mr. Kaminski's character witnesses were a teacher, two Belfield ranchers, a real estate broker and an attorney and CPA.

Defense counsel argued that not only was there an absence of proof, direct, circumstantial or inferentially, of any intent to defraud the bank, there was now positive evidence in the record of petitioners' good faith and their excellent reputations for all character traits material under the indictment. The trial judge felt he was "in a situation of Rule 29(b), "F.R.C.P., and said "I reserve my decision on the Motion until I see the action of the jury." The motion was ultimately denied.

B. Facts material to a consideration of jurisdiction to grant a new trial.

Upon receiving the verdicts at 10:30 p. m. on January 9th, the court, without ruling on the pending motion for judgment of acquittal, recessed the case subject to call. No motions were made at that time or within seven days thereafter.

No further action occurred in the case until on February 11, 1976, the government

filed a memorandum urging denial of the still-pending motion for acquittal upon which judgment had been reserved under Rule 29(b). Petitioners responded to that by filing a "Memorandum In Support of Motion for Judgment of Acquittal."

Defendants' memorandum observed that no new trial had been requested since the acquittal motion, which they believed meritorious, had not yet been ruled upon and, should the verdicts be set aside by the granting of that motion, it would not be necessary to move for another trial. The memorandum, however, did urge that the guilty verdicts were against the greater weight of the evidence and that prejudicial error had occurred in the giving of instructions, all of which would require a new trial. Defendants therefore asked that, should the motion for judgment of acquittal be denied, the court then order a new trial in the best interests of justice, and defendants waived any claim or privilege against double jeopardy if the same be ordered.

In an Order entered March 15th (over two months after verdict) the court first made this comment:

"The trial Judge did not agree with the guilty verdicts handed down." (emphasis ours.)

The court, however, then denied the motion for judgment of acquittal on all counts on which guilty verdicts were returned, finding that there was evidence in the record on each element of the of-

fenses sufficient to justify submitting the matter to a jury. The court also denied the alternative motion for a new trial upon the jurisdictional grounds that it had not been filed within seven days after the verdicts.

Petitioners then moved for a mistrial or (again) for a new trial contending that the court had not lost jurisdiction to order a new trial so long as it had under consideration a motion for acquittal undetermined under Rule 29(b). The new trial aspect of this motion was denied, again on jurisdictional grounds.

C. Facts material to a consideration of whether the failure to give crucial instructions was substantial error requiring a new trial.

1. Consent by the board. Defendants' Tendered Instruction No. 13, refused by the trial court and nowhere else covered by the instructions as given, read as follows:

> "A defendants use of the proceeds of a loan not shown to have been unlawfully or improperly made under banking laws or regulations, does not constitute misapplication of bank funds unless some conversion takes place."
>
> "Consent to a lawful loan by the bank's board of directors is a defense to the crime of wilfull misapplication of funds based on such

loan, since there can be no conversion of funds if there was valid consent by the bank or its board of directors."

The judge rejected the first paragraph of this instruction as being "too bland", and the second paragraph as "not good law"

Defendants' Tendered Instruction No. 17, also refused in its entirety and nowhere else covered in the instructions as given, read as follows:

> "The board of directors of a national bank has authority and discretion to extend credit or make loans to bank officers, directors, its employees and stockholders.
> "A lawful loan or other bank expenditure alleged by the government to be a conversion of bank funds is not a wrongful misapplication if the board of directors, knowing the facts, approved such loan or expenditure, even though it may be in bad judgment to do so."

The judge felt this was also bad law.

2. Maladministration compared with misapplication.

The portion of Defendants' Tendered Instruction No. 3, which was rejected and nowhere else covered in the instructions as given, read as follows:

> "The misapplication condemned by statute is something more than irregular or improper use of the bank's funds; fraud must be found and some unlawful taking or unauthorized conversion of the bank's funds must take place.
> "Acts amounting to maladministration, neglect of official duties or indifference to the interests of the bank do not constitute criminal misapplication of funds."

3. Good Faith Defendants' Tendered Instruction No. 7, which was refused, read as follows:

> "Fraudulent intent is the essence of the offenses with which the defendants are charged. In order to establish fraudulent intent on the part of a person, it must be established that such person knowingly and intentionally attempted to deceive.
>
> "Good faith constitutes a complete defense to one charged with an offense of which fraudulent intent is an essential element. Each defendant maintains that he acted in good faith and, although he doesn't have to prove this, if you believe this, or if you entertain a reasonable doubt as to whether he acted with the requisite intent, it is your obligation to find him not guilty."

Instead, the court gave a pattern instruction on the burden of proving good

faith and a stock stock instruction (objected to) on "motive" which, in part, said: "Good motive alone is never a defense where the act done or omitted is a crime. So, the motive of the accused is immaterial..."

4. Probability of Loss to the Bank.

Since the evidence established that in all instances, except the Count 6 $47,000 loan, petitioners were entitled to take earnings and undivided profits of the Bank greater than the sums allegedly misapplied, they requested (and they court rejected) an instruction to the jury that:

> "...should you find from the evidence that as a stockholder, a defendants' share of the Bank's undivided profits and accumulated earnings exceed the amount disbursed by the Bank for payment of expenses deemed personal and improper by the Government, then there is not a sufficient probability of loss to depositors of the Bank from which the necessary intent to defraud or injure the bank might be inferred..."

D. Facts material to a consideration of whether the prejudicial effect of Count 1 evidence compels a new trial.

The evidence offered to prove Count 1 not only showed, incidentally, that the petitioners defaulted on substantial

bank stock loans at Marquette and Northwestern National Banks, it hinted of other improper conduct on their part in connection with the sale by petitioners of part of their bank stock to approximately 40 residents of the Belfield area, all of whom were prosecution witnesses.

Each Belfield purchaser and the petitioners as sellers, signed a letter agreement wherein the purchaser authorized petitioners to pledge or hypothecate and deliver to the Marquette bank all of the shares being purchased, as collateral to secure defendants' bank stock loan. Most of the Belfield area investors were farmers or ranchers, and even though they had signed such letter agreements, many of them testified that they did not know the shares they were purchasing were then pledged and would continue to be held as collateral for petitioners' loan at Marquette. Most did not know why they had only a copy instead of an original stock certificate.

The investor witnesses testified to various oral representations made, primarily by Kaminski, in connection with their stock purchases. Some said they were promised a 60% return on their investment within a three-year period because the petitioners planned to form a holding company, purchase other banks, and dividends from those banks would provide them return of capital.

Many either did not read the agree-

ments they signed or, if read, did not understand them. Some said Mr. Kaminski talked very briskly and made a smooth sales pitch. Others said no high pressure was used. Some thought they could negotiate their stock at any time.

Each investor was asked on direct examination whether he or she had ever received any dividends, and each replied "no".

Several of the witnesses testified that they understood their stock was to be pledged for a loan the purpose of which was to start a holding company. One or two of them were under the impression that the money they used to purchase this stock would be guaranteed by the Federal Deposit Insurance Company. Many of them thought they were buying stock in the bank from the bank itself. Several said they would never have bought the stock if they had known it was pledged.

The express purpose and effect of the testimony and innuendo elicited through these witnesses was to prejudice the defendants by suggesting that they:

- made misrepresentations to local investors:

- improperly sold bank stock;

- falsified stockbook records;

- sold stock at inflated prices;

-failed to deliver certificates to stock purchasers;

-improperly pledged shares belonging to others;

-cheated the local residents and caused them to lose their investments;

-failed to pay and defaulted on large loans at the Marquette and Northwest National Banks; and

-failed to pay and defaulted on notes given to local investors.

After judgment of Acquittal was granted on Count 1, the defense, in light of all testimony concerning defaults, misrepresentations and broken promises outlined above, requested the court, before defendants presented their case and again in final instructions, to charge the jury (in accordance with Defendants Tendered Instruction No. 1 (Refused) that evidence presented on Count 1 must be ignored by them in their deliberation upon the counts ultimately submitted. However, the court only advised the jury "to disregard all evidence received previously insofar as that evidence deals only with Count 1." Since no Bank funds were involved such evidence was not evidence of similar acts or wrongs and was not admissable, nor did the Court allow it or intend it to be considered by the jury for such purpose. The trial judge properly excluded it on that theory and gave no instruct-

ion on evidence of "other crimes." The judge meant to instruct entirely to the contrary. He did not do so adequately.

Defendants, of course, never had the opportunity to rebut this evidence since, by the time they testified, Count 1 had been dismissed and such matters were not revelant, but Government counsel were permitted to cross-examine defendants' character witnesses from Belfield on those matters, over objection, on the theory that these several defaults were material on the good faith and specific intent issues on the remaining misapplication counts.

There is no dispute that this evidence was intended to be prejudicial and influence the jury's consideration of guilt or innocence on Counts 6 through 12. In response to defense objections which complained of testimony solicited in this area, and which anticipated the Government's jury argument, the prosecutor told the Court: "There's absolutely no question I'm attempting to prejudice these defendants... I intend to show that these defendants by a dishonest act entered all of that stock in their own name rather than in the investors... (who had purchased stock)... it speaks to their truthfulness in dealing with the Bank..." The Government got it in despite the judge's ruling that "it certainly is not admissable on that theory", because the prosecutor, over objection, was permitted to argue to the jury that defendants' dealings with the Minnesota

banks and the Belfield stock purchasers evidenced and impeached their protestations of impeccable reputation, truth, honesty, and good faith in the transactions involved in the counts submitted to them for determination.

The prejudicial effect of Count 1 evidence was the subject of defendants' Motion for Mistrial filed subsequent to the trial court's denial of their motion for judgment of acquittal after verdict. The basis for mistrial urged was that the evidence received on Count 1, which was in no way relevant or material to the misapplications alleged in counts 2 through 12 and would not have been admissable had those counts been tried separately, was so prejudicial that it could not be ignored by the jurors and had a substantial effect upon their verdicts so as to deprive the defendants of a fair trial. Defendants had not moved for a severance of counts, having no pre-trial basis to gauge the prejudice, but asked the Court to declare a mistrial under Rule 52(b) F.R.C.P. as a defect affecting substantial rights. This motion further reminded the trial judge that he himself had acknowledged the prejudice when, in granting the motion for acquittal on Count 1 at the close of the Government's case, he said:

> "But more than half of the three weeks of trial, and more than half of the evidentiary material is addressed to the charge in count one ...the government clearly realized

the cumulative effect, or blending effect, of the dollar amounts involved in count one.

. . .

"So I conclude not only that the evidence adduced as to count one cannot sustain a jury verdict of guilty, but also that if such evidence were allowed to go to the jury, it would have a substantially prejudicial impact on the jury's consideration of the other counts."

This evidence was also the subject of the second Motion for New Trial filed by petitioners after the court had ruled that the verdicts would stand. Things developed rapidly after trial, and had this case been tried 90 days later, the evidence would have shown that all loans and notes were paid and all Belfield investors were fully satisfied; that no Belfield investor lost any money; that all investors received what was promised, including their stock certificates; that all Beran and Kaminski notes were paid; that the Northwest National Bank was paid; that no foreclosure was threatened; that nothing was pledged and that nothing was in default. That evidence, we contend, would substantially affect the verdict of a jury and would result in a different outcome than was reached here. Even if the Government could not offer this new evidence, the defendants could; but even if it was totally inadmissable upon retrial, at least a new jury would

not hear the damaging evidence which was presented before.

REASONS FOR ALLOWANCE OF WRIT

A. Denial of Judgment of Acquittal

Petitioners assert that the Court of Appeals has sanctioned a departure by the trial court so far from the accepted and usual couse of judicial proceedings, in refusing to apply the recognized standard to test evidence, so as to call for an exercise of this Court's power of supervision.

The misapplication condemned by statute means more than mere maladministration. It must be a wilfull misapplication with intent to injure or defraud the bank. Evans v. United States, 153 U.S. 584 (1894). And the taking must be unlawful or some conversion must take place. Accordingly, if the application was not itself an illegal act, i.e. in violation of some provision of law, banking rule or regulation, there can be no criminal misapplication unless the proof shows a conversion, i.e. an unauthorized assumption and exercise of control under circumstances where consent should have been sought and given. Accordingly, if a disbursement not unlawful is made with the knowledge and valid consent of duly authorized officers or directors of a bank, there can be no conversion and, therefore, no crime under the statute. United States v. Britton, 107 U.S. 512 (1883); Mulloney v. United States, 79

F.2d 566 (1 Cir.1935); United States v. Sorensen, 330 F. Supp.642 (D.C. Mont. 1971).

The evidence established that in every instance on the counts in question, the disbursements were lawfully made and not prohibited by or in violation of any rule or regulation governing national banks. The fact that examiner Nelson questioned these transactions and felt they involved "self-dealing" or "unsound banking practices" or expenses paid which were "personal" in nature, does not make them unlawful nor constitute them criminal misapplications. An officer appointed by the Comptroller to examine the affairs of a national bank does have certain discretion to direct that doubtful assets be collected or charged off, but his characterization does not alter the legality of the original application.

Every disbursement involved in this case was expressly approved by the knowledgeable, valid consent of the Bank's board of directors. In every instance approval was by a majority of members not disqualified by reason of interest or otherwise, and there was no evidence whatsoever that the defendants attempted to over-reach or unduly influence the vote of any board member in these matters. There was no unauthorized conversion of funds involved in any count of this indictment.

The Government must prove beyond a

reasonable doubt, as an essential element of the offense, that the defendants acted knowlingly, wilfully and with the specific intent to injure or defraud the Bank. Proof of such intent may sometimes be inferred from conduct such as reckless disregard for the Bank's best interests as, for example, where a loan officer tells a borrower that he will not have to be responsible for the note he signed. Proof of such intent is sometimes supplied by evidence of concealment, or of a fictitious borrower, or that false entries were made in documenting the transaction; but the requisite intent cannot be presumed, for instance, by the mere fact that a loan remains repaid, and there was no falsity or concealment in this case.

The evidence may, in fact, as it did in this case, negate an intent to defraud For example, a loan made to one financially responsible upon the belief and with the reasonable expectation that it will be paid evidences good faith rather than a reckless disregard. And, although the making of restitution may not be a defense to misapplication once committed, repayment does demonstrate a lack of intent to injure the Bank.

Not one speck of evidence in this case established that the defendants acted with intent to injure or defraud the Bank, nor were there circumstances from which one reasonably could infer such intent. The positive evidence and all justifiable inferences were to the contrary.

Although no actual loss to the Bank need be shown, it must be established that a sufficient probability of loss existed and that the Bank was, at least momentarily deprived of its funds. Sorensen, supra.

At no time, in respect to the questioned transactions, was there sufficient probability that a loss to the depositors would occur. The capital account was never depleted nor were deposits ever in jeopardy. Not only that, but the Bank had, over and above its capital account, funds which represented current earnings and undivided profits--owned by its shareholders. None of the criticized expense payments exceeded the amount of such earnings and profits to which defendants were entitled by reason of their stock ownership. There was, therefore, no loss to the Bank, nor was there a sufficient probability of loss to the depositors of the Bank. The Bank always was, and still is, sound.

The Mandate of Rule 29 is that:

> "The Court on motion of a defendant... shall order the entry of judgment of acquittal...after the evidence...is closed if the evidence is insufficient to sustain a conviction of such offense.."

The standard to test a Rule 29 motion announced by the lower court was:

> "In passing on a motion for a directed verdict of acquittal, (the trial judge) must determine whether upon the

> evidence, giving full pay to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

It is for the trial judge to first determine whether the evidence meets that test. In considering the evidence and inferences under the standard announced, the trial judge, as a reasonable person, was bound to acquit if he could not himself fairly conclude guilt beyond a reasonable doubt. He could not, and did not.

When the motion for judgment of acquittal was first made after the Government rested, the trial judge recognized that the was obligated to follow the mandate of Rule 29, but then he refused to apply the very standard he said must be used to test the evidence--"Without passing on whether there is enough evidence to meet the standard set out above ..." We respectfully submit that had the judge tested the evidence by that standard, as he was obligated to do, no count would have survived.

The motion for Judgment of Acquittal was again made at the close of all evidence in the case, and, at that point, the sufficiency of the evidence to sustain a conviction should have been determined by an examination of the entire record. Defendants' motion was then even stronger than when first made. There was

positive and uncontradicted evidence of lack of intent to defraud, good faith and and good character. Even if the jurors were entitled to disregard the testimony that the defendants never intended to injure or defraud the Bank, they could hardly ignore the testimony of excellent reputation for truthfulness, honesty, fair dealing, and being law-abiding which alone was sufficient to generate a reasonable doubt. Defendants supplied no deficiencies in the Government's case and were, at this juncture, again entitled to full acquittal.

The court's order of March 16, 1976 stated, as grounds for denying the motion, that he found in the record some evidence as to each of the separate elements. That is not enough. He must have been convinced that a reasonable mind could find guilt beyond a reasonable doubt. He was not so convinced. To the contrary, as appears from his order, he felt the defendants should have been found not guilty. With that as his analysis of the evidence under the applicable standard, the mandate of Rule 29 required the trial judge to order entry of judgment of acquittal, not-withstanding the verdicts.

B. Jurisdictional to Grant a New Trial.

Petitioners assert that it is important for this Court to interpret Rule 33 so as not to deprive a trial judge of jurisdiction to order a new

trial while he still retains power to set aside a jury verdict. We do not believe that the rules were otherwise intended, and to so construe them does violence to reasoning.

The reason given for 7-day time limitation of Rule 33 is so that matters relating to the trial might be called to the courts' attention while the evidence is still fresh in mind. When a case remains under consideration after verdict under Rule 29(b), the issues, presumably, are never out of mind.

While a Motion for judgment of Acquittal, upon which decision has been reserved pursuant to Rule 29(b), remains pending and unresolved, the time for filing a Rule 33 motion is stayed. Although verdicts may have been returned by the jury and entered by the clerk, the court has power to accept or reject them. And, petitioners contend, until a Rule 29(b) motion is resolved, the court has not accepted the verdicts and the time limitation is tolled. We say, in effect, that the court itself has, without application by counsel, extended the time under Rule 33, and, unquestionably, it has power to do so.

A judge vested with power to set aside verdicts for insufficiency of the evidence should have no less power to do so if the verdicts are contrary to the greater weight of the evidence; and if a defendant has invoked that power by moving for an acquittal, he should not be required to

compromise his position by requesting the less desirable alternative of another trial whereas an acquittal might otherwise have resulted.

In this case, although he did not say so, the implication is that the judge might have granted a Rule 33 motion had one been filed within seven days, not because the Court admitted to error but because the verdicts were contrary to the greater weight of the evidence as the judge viewed it. He thought the petitioners were not guilty but believed he had lost jurisdiction to set aside the verdicts. But even though defendants had not then moved for a new trial here, the court itself could have granted one because, although traditionally prevented from doing so because it places an unwilling defendant in double jeopardy, in this case the defendants had waived such privilege. Moreover, the court could have treated petitioners' Rule 29 motion as a Rule 33 motion since it contained all necessary ingredients.

C. Substantial Error in Instructions.

Petitioners assert that the Court of Appeals has sanctioned a departure by the trial court so far from the accepted and usual course of judicial proceedings, by ignoring decisions of this Court, so as to call for an exercise of this Court's power of supervision.

The propositions announced by this Court almost 100 years ago in Britton, supra and Evans, supra, principally as

they relate to the significance of consent by a board and of maladministration, have been wholly rejected in this case. The trial court refused instructions couched in the language of Britton and Evans as being "not good law", and the Court of Appeals has sanctioned that.

The appellate court did pay lip service to Evans but then totally ignored it. The opinion of the Court of Appeals does not even discuss failure to give the instructions requested by petitioners. The court simply disimsses the problem by saying, in the last paragraph, that the trial court gave, in substance, all the instructions to which the appellants were entitled. It most assuredly did not.

The instructions requested by petitioners were entirely justified by the evidence and were crucial to the defense. They were not given or covered directly or indirectly, in substance or in part, by the other instructions. There was a lot of evidence about board consent but there might as well have been none. The judge never made any finding, of fact or law, that valid board consent was lacking, and the jurors no doubt ignored all evidence that consent was given because they simply did not know what, if anything, it meant.

D. The Taint of Count 1

Petitioners assert that the Court of Appeals has sanctioned a departure by the trial court so far from the accepted and usual course of judicial proceedings, by refusing to recognize the "manifest

necessity" of a new trial in this case, so as to call for an exercise of this Court's power of supervision.

Although Count 1 was dismissed and the jurors did not deliberate upon it, even with a proper admonition concerning that evidence, we submit that no jury could forget or ignore the accusations and innuendos of wrong-doing which consumed so much of the government's case.

The evidence on Count 1, which was in no way relevant or material to the alleged misapplications charged in the other counts, poisoned the remainder of the case and deprived petitioners of a fair trial. The theory of Count 1 was fatally defective, which substantially affected the rights of petitioners and required a mistrial to be declared.

CONCLUSION

To the best of our knowledge, this Court has not during this century reviewed a misapplication of bank funds case. It is time to reaffirm the principles of Britton and Evans because their application has been ignored.

This case presents an ideal opportunity to do so. There were errors of substantive law as well as in procedure which resulted in unjust convictions. Had the case been tried to the court, petitioners would have been found not guilty.

In the interest of justice, this Court should exercise its supervisory power to

order an acquittal or new trial.

Respectfully submitted,

James W. Heyer

JAMES W. HEYER
Attorney for Petitioners
6825 E. Iliff Avenue #304
Denver, Colorado 80224

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1314

United States of America,	*
Appellee,	*Appeal from the
	*United States
v.	*District Court
	*for the District
Ray J. Beran and	*of North Dakota.
Andrew Kaminski, a/k/a	*
Andrew M. Kaminski,	*
Appellants.	*

Submitted: October 5, 1976

Filed: December 16, 1976

Before HEANEY, BRIGHT AND ROSS, Circuit Judges.

HEANEY, Circuit Judge.

The appellants, Ray J. Beran and Andrew M. Kaminski, were indicted on twelve counts of misapplication of bank funds in violation of 18 U.S.C. §656. Each of the counts charge one, or the other, or both of the appellants with

the misapplication of bank funds while they were either officers, directors or stockholders of the First National Bank of Belfield, North Dakota. Count 1 charged the appellants with misapplication and conversion to their own use of $482,000 of bank funds by selling an unauthorized overissue of bank stock. The alleged "overissue" arose out of a series of stock transfers by the appellants of previously issued capital stock in which the stock certificates were not properly returned and cancelled. At the close of the government's case, the court granted the defense motion, under Fed. R. Crim. P. 29, for a judgment of acquittal on Count 1 because of a failure to prove that monies of, or entrusted to, the bank were involved. After the defense motion for a judgment of acquittal as to the remaining counts was denied, the case was submitted to the jury which found Beran guilty on Counts 7, 9, 10 and 12, and Kaminski guilty on Counts 6, 8, 10 and 11. Both appellants were fined $3,000 and placed on probation for two years with the imposition of any additional sentences suspended. We affirm.

I

The most serious point raised by the appellants is whether the convictions must be set aside because of the prejudicial influence of the Count 1 evidence. Ordinarily, the rule is that error in the admission of evidence

> may be cured by withdrawing the evidence from the jury's consideration and instructing the jury to disregard it. *** However, as an exception to the general rule, where the character of the testimony is such that it will create so strong an impression on the minds of the jurors that they will be unable to disregard it in their consideration of the case, although admonished to do so, a mistrial should be ordered.

Maestas v. United States, 341 F.2d 493 496 (10th Cir. 1965) (citations omitted); Nash v. United States, 405 F.2d 1047, 1053 (8th Cir. 1969) (quoting Maestas with approval). An even more stringent rule must be applied here because the appellants failed to make a timely motion for a mistrial or a new trial. [1] We cannot reverse unless the prejudicial effect of the Count 1 evidence was so great that the trial court should have ordered a mistrial upon its own motion. [2]

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[1] Under Fed. R. Crim. P 33, a motion for a new trial must be made within seven days after the verdict or finding of guilty unless it is based upon newly discovered evidence. When the briefs were filed on the reconsideration of the motion for a

1 continued

judgment of acquittal under Fed. R. Crim. P. 29 on Counts 2 through 12, the appellants did move in the alternative for a new trial and offered to waive the constitutional protection agains double jeopardy. However, the motion was made more than seven days after the verdict and was not initially based upon a claim of newly discovered evidence. Since the time limitations are jurisdictional, the trial court correctly found it was without jurisdiction to consider an untimely motion for a new trial. United States v. Pitts 508 F.2d 1237 (8th Cir. 1974); United States v. Johnson, 487 F.2d 1318 (5th Cir. 1974): United States v. Newman, 456 F. 2d 668 (3rd Cir. 1972); Rowlette v. United States, 392 F.2d 437 (10th Cir. 1968).

The appellants subsequently moved for the reconsideration of their earlier motion for a new trial on the basis of "newly discovered" evidence which would show that none of the local investors lost any money and that most of the notes in default at the time of trial have since been paid. The trial court correctly held that this does not constitute newly discovered evidence. See Wright, 2 Federal Practice and Procedure §557 (1969).

The appellants argue that the time within which a motion for a new trial

1 continued

must be made is tolled when the court has before it a Rule 29 motion for judgment of acquittal. We do not agree. While Rule 29 motion may be combined with a Rule 33 motion, they are governed by very different standards. Id. §§467 and 553. A Rule 29 motion for a judgment of acquittal will only be treated as a Rule 33 motion if contains allegations sufficient to constitute a motion for a new trial. United States v. Baker, 432 F. 2d 994, 995 (10th Cir. 1970). The appellants' oral motion for a judgment of acquittal cannot be so construed. While the subsequently filed "Memorandum in Support of Motion for Judgment of Acquittal" and "Motion for a Mistrial or for a New Trial" do contain sufficient allegations to constitute a Rule 33 motion, they were not filed within the seven-day time period.

[2]While the trial court may order a mistrial on its own motion, its power to do so is limited by the double jeopardy clause of the Fifth Amendent. Only if there is an "imperious" or "manifest necessity" for doing so will the ordering of a mistrial come within the recognized exception to the double jeopardy provision. See Downum v. United States, 372 U.S. 734 (1963); Wade v. Hunter, 336 U.S. 684 (1949); United States v. Perez, 22 U. S. (9 Wheat.) 579 (1824).

The appellants argue that a mistrial should have been ordered because of the prejudicial nature of the Count 1 evidence itself and because of the importance given to it by the government. The evidence as to Count 1 showed that the appellants defaulted on substantial bank stock loans and on notes of Belfield area investors, and indicated that they might have engaged in misrepresentation and other improper practices as well in connection with the stock transfers. It took twelve days for the government to try its case in chief. During the first eight days of trial, forty-six witnesses testified with respect to Count 1. During the final four days of the government's case in chief, some of the testimony given by the remaining seven government witnesses also pertained to Count 1.

On the other hand, cautionary instructions were given. At two points in the trial, the court instructed the jury "that Count 1 of the indictment has been disposed. You are*** instructed to disregard all evidence received previously insofar as that evidence deals only with Count 1." Additionally, all of the exhibits which pertained only to count 1 were withdrawn from the jury's consideration. Furthermore, the jury acquitted the appellants on Counts 2 through 5[3] which indicated that it was not so overwhelmed by the Count 1 evidence as to be unable to give serious consideration to the remaining counts. It is conceded by the appellants that

there is no evidence of a bad faith attempt by the government to prove Count 1 for the purpose of prejudicing the jury as to the other counts. Finally, as we will establish, there was substantial evidence to support each of the jury verdicts. While the matter is not free from doubt, we are unable to conclude that it was reversible error for the trial court not to order a mistrial on its own motion.

II

The appellants argue that a judgment of acquittal should have been granted as to all of the remaining counts because the government failed to prove criminal misapplication, a specific intent to injure or defraud the bank, on the probability of loss to the bank, which are essential elements of the offense of misapplication of bank funds under 18 U.S.C §656.[4] We disagree, a careful review of the voluminous record convinces us that the evidence as to each of the counts when viewed, as we must, in the light most favorable to the

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[3]Counts 2 through 5 alleged that the appellants made self-dealing personal loans with the intent to defraud the bank.

government and giving the government the benefit of all favorable inferences reasonably to be drawn from the evidence,[5] was sufficient to sustain the jury verdicts.

4§656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any***bank***embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

[5]After the verdicts were returned, the trial judge indicated he felt the jury reached the wrong result. Such disagreement does not, as intimated by the appellants, constitute grounds for a new trial or a mistrial. It is not

It is well established that willful misapplication under 18. U.S.C. §656 means more than maladministration. Evans v. United States, 153 U.S. 584 (1894) decided under 12 U.S.C. §592, the predecessor of 18 U.S.C. §656); United States v. Bevans, 496 F. 2d 494, 499 at n.4 (8th Cir. 1974). Conversion of bank funds for personal use, or for the use of another individual or corporation, is encompassed within the definition of criminal misapplication. United States v. Wilson, 500 F.2d 715, 720 (5th Cir. 1974); United States v. Bevans, supra at 497; United States v. Kernodle, 367 F.Supp. 844, 849 (M.D.N.C. 1973). There is evidence as to each of the counts upon which the appellants were convicted that there was a conversion of bank funds for their personal use or for the use of corporations in which they possessed a substantial interest.

Count 6[6] upon which Kaminski was convicted, involved an unsecured $47,500 loan to a corporation he owned and con-

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5 continued
for the trial judge to assess the credibility of witnesses, to resolve conflicts in testimony or to weigh the evidence as these are jury functions. United States v. John Hamphill, No. 76-1484, slip op. 4 (8th Cir., filed November 8, 1976); United States v. Powell, 513 F.2d 1249, 1250 (8th Cir. 1975), cert. denied, 423 U.S. 853 (1976); United States v. Gaskill, 491 F.2d 981, 982 (8th Cir. 1974).

trolled. While the stated purpose of the loan was to purchase real estate, the proceeds were instead invested in a highly speculative coal development venture. In support of the loan, unaudited financial statements of the corporation, and of Kaminski were tendered, both of which were grossly inflated. Both Beran and Kaminski were charged in Count 10, which involved the appropreation by the appellants of funds of an insurance company wholly owned by the bank for their own use in establishing a bank holding company. The appellants later acquired the insurance agency from the bank; but at the time of the appropriation, the sale was not yet been completed and no sale price for the agency had been established.

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[6]Count 6 is the only count upon which the appellants were convicted involving a transaction when the appellants were no longer on the board of directors of the bank, though both were stockholders, each owning a seventeen percent interest in the bank. 18 U.S.C. §656 applies to individuals "connected in any capacity" with a bank. This has been construed to include stockholders. Garrett v. United States, 396 F.2d 489 (5th Cir.), cert. denied, 393 U.S. 952 (1968), rehearing denied, 393 U.S. 1046 (1969).

Conversion of bank funds for personal use was also charged in Counts 7, 8, 9, 11 and 12 which all involved the fraudulent payment by the bank of various expenses at the instigation of the appellants. In Count 7, Beran was charged with converting bank funds to his own use through the financing of a feedlot feasibility study by the bank. The manager of a car wash owned by Beran who was without any experience or qualifications in the area, was hired to conduct the study. A room in the car wash was rented at a highly inflated rate. Subsidies to the car wash made by Beran ceased once payments were begun for the feasibility study. Only a very sketchy report was ever submitted. The charge in count 8 was that Kaminski caused the bank to purchase a Cadillac which he used in Denver and only rarely in Belfield. Both Beran and Kaminski were charged in Count 9, which involved the payment of $1,000 in legal fees incurred by them in connection with the purchase of controlling stock in the bank. Counts 11 and 12 involved the payment by the bank of various expenses of the appellants, some of which are clearly personal and some of which were incurred prior to the date they became bank directors. Clearly, considering the record in the light most favorable to the government, there is evidence as to each of the counts upon which the appellants were convicted that there was a conversion by the appellants of bank funds.

In this case, there is evidence that

prior approval of the board of directors was obtained as to some of the transactions which formed the basis for the criminal charges. The valid consent of the board of directors is a defense to the crime of misapplication of bank funds. Mulloney v. United States, 79 F.2d 566, 583 (1st Cir. 1935), cert. denied, 296 U.S. 658 (1936). The board, however, has no authority to approve of a crime or fraud on the bank. United States v. Morse, 161 F. 429, 435 (C.D. S.D. 1908); United States v. Sorensen, 330 F. Supp. 642, 645-646 (D.Mont.1971). Thus, if an intent to defraud through the conversion of bank funds existed, then approval of the board of directors is no longer material to whether there was a misapplication of bank funds.

It is contended by the appellants that the government failed to prove an intent to defraud or injure the bank. Such intent is still considered to be an essential element of the crime even though it is no longer explicitly required by statute. United States v. Schmidt, 471 F.2d 385, 386 (3rd Cir. 1972); Seals v. United States, 221 F.2d 243, 245 (8th Cir. 1955). Criminal intent may be inferred from all the facts and circumstances of the case. United States v. Tokoph, 514 F. 2d 597, 603 (10th Cir. 1975); United States v. Williams, 478 F.2d 369, 373 (4th Cir. 1973). It "exists if a person acts knowingly and if the natural result of his conduct would be to injure or defraud the bank even though this may not

have been his motive." United States v. Schmidt, supra at 386. Viewing the record, as we must, in the light most favorable to the government, it is clear that sufficient evidence was presented from which the jury could find that the appellants engaged in the continuing course of conduct to defraud the bank that we have outlined above.

The possibility of future benefit to the bank[7] is not a defense to the charge of misapplication if the other necessary elements of the crime are present. United States v. Acree, 466 F. 2d 1114, 1118 (10th Cir. 1972), cert. denied, 410 U.S. 913 (1973); United States v. Boedker, 389 F. Supp. 360, 366 (M.D. Pa. 1974). Nor is the restitution of bank funds a defense as the crime of misapplication is complete when the misapplication occurs.[8] United

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[7]The appellants attempted to justify many of the questioned applications of bank funds on the ground that the appellants hoped that the bank would ultimately benefit: the feedlot study was to benefit the community and thus ultimately the bank; the Cadillac was to be used in the solicitation of business for the bank; the legal expenses incurred in gaining control of the bank benefited the bank because it resolved uncertainty about the bank ownership; the funds from the bank insurance agency

States v. Acree, supra at 1118; United States v. Morse, supra at 435. Only a probability of loss to the bank is needed to establish an intent to defraud. United States v. Bevans, supra at 500, n.4 (instructions approved). In this case, an actual loss has been shown as the amounts involved in Counts 6 and 7 have never been repaid; and the bank was deprived of the amounts involved in the other counts for several months prior to restitution. Thus, it is clear that sufficient evidence was presented from which the jury could infer that all of the necessary elements of criminal misapplication of bank funds existed.

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7 continued
were to partly defray the expense of establishing a bank holding company which was hoped to benefit the bank. At trial, serious doubt was raised as to most of the attempted justifications, and the jury was entitled to disregard them.

[8] At the request of the bank examiner restitution has been made of all the amounts involved in Counts 8, 9, 11 and 12 and part of the amount covered by Count 10. The loan involved in Count 6 was written off at the request of the bank examiner and has not been repaid. The feedlot study expenses involved in Count 7 have never been restored to the bank, though it should be noted the bank examiner did not direct restoration of the funds on this count.

III

The appellants finally contend that a mistrial or a new trial should have been ordered because of error in the instructions. A careful review of the instructions given by the trial court and the instructions proposed by the defense reveals that the court gave, in substance, all the instructions to which the appellants were entitled.

We affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.